

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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CRAIG KANGAS,

Plaintiff-Appellant,

v

TAMMY A. GOODREAU,

Defendant-Appellee.

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UNPUBLISHED

April 20, 2010

No. 294326

Marquette Circuit Court

LC No. 08-046198-DC

Before: SERVITTO, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM.

In this custody matter, plaintiff appeals as of right the trial court's award of primary physical custody of the minor child, SGK, to defendant. Plaintiff specifically argues that the trial court erred in determining that an established custodial environment existed with defendant only, and that the trial court incorrectly evaluated five of the statutory best interest factors. We affirm.

Plaintiff and defendant are the parents of SGK, born on April 17, 2007. The parties' relationship commenced in 2005 and ended in 2008. The parties never married and always maintained separate residences. From birth until October 2008, SGK resided with defendant exclusively. Plaintiff never had an overnight visit. He visited the child at defendant's home for a period of one to three hours almost every day. Plaintiff testified that he occasionally fed and diapered SGK. In contrast, defendant testified that plaintiff helped very little in caring for SGK.

Defendant also resides with three older children from a previous relationship. One suffers from multiple, severe disabilities as a result of being shaken by Charles Ellis, the father of the three older children. Ellis was convicted of child abuse stemming from this incident and his parental rights to all three children were terminated.

After his parental rights were terminated, Ellis continued to own a parcel of property adjacent to defendant's property. In 2007, after Ellis was released from parole, defendant's older children reported seeing him on his property and were disturbed. As a result, an agreement was reached requiring Ellis to provide notice before visiting the neighboring property. Pursuant to the agreement, Ellis contacted defendant in October 2008 and notified her that he would be visiting his property the following day. While he was on the property, Ellis reportedly had some contact with defendant's older children. He briefly came onto her property to fix the children's swing set and then immediately returned to his own property.

The following weekend, Ellis again contacted defendant and informed her that he would be visiting his property. Plaintiff became aware of the intended visit and arranged to have SGK for the day. Defendant and her remaining children left the house for the day. Thereafter, defendant sought and obtained a personal protective order (PPO) against Ellis.

Plaintiff was dissatisfied with defendant's response to Ellis's presence. He unilaterally removed SGK from defendant's care and then filed the instant action seeking custody. Following a temporary custody hearing, the trial court concluded that an established custodial environment existed with defendant. Yet, the court determined that SGK's best interests would be served during the pendency of the custody proceeding if the parents were joint custodians. SGK would spend two overnights and one evening a week with defendant and the remainder of the time with plaintiff. The court was concerned with Ellis, but did not believe defendant failed to appreciate the seriousness of his presence on her property and contact with her children. The court made clear that its ruling was merely a temporary order until a full custody trial could be completed.

Following the custody trial, the trial court reiterated its previous finding that an established custodial environment existed with defendant. Moreover, after completing a detailed analysis of the statutory best interest factors, the court concluded that plaintiff had failed to prove by clear and convincing evidence that such established custodial environment should change. Consequently, the court awarded the parties joint legal custody and awarded defendant primary physical custody.

Three standards of review apply in custody cases. The trial court's findings of fact are subject to review under the great weight of the evidence standard. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). This Court will affirm the findings of the trial court concerning the existence of an established custodial environment and with respect to each best interest factor unless the evidence clearly preponderates against those findings. *Id.* This Court reviews a trial court's discretionary rulings, such as a determination of custody, for an abuse of discretion, and reviews questions of law for clear error. *Id.* In the child custody context "[a]n abuse of discretion exists when the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). Accordingly, a trial court's custody decision "is entitled to the utmost level of deference." *Id.* at 706. "A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law." *Phillips*, 241 Mich App at 20.

Plaintiff first challenges the trial court's determination that an established custodial environment existed with defendant only. Because a temporary order existed providing for joint custody of SGK, the court was required to make a determination whether an established custodial environment existed before rendering a custody order. MCL 722.27(1)(c). "Whether an established custodial environment exists is a question of fact." *Berger*, 277 Mich App at 706. MCL 722.27(1)(c) provides that an established custodial environment exists if "over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered."

In this case, SGK resided with defendant exclusively until just before the institution of the custody suit. Even if we accept for the sake of argument plaintiff's assertion that he visited almost every day for several hours, as opposed to defendant's contention that his visitation occurred at his convenience and usually only lasted one hour, the parties appear to agree that plaintiff provided little care for SGK. Plaintiff acknowledged that before removing SGK, she had never spent an overnight at his home. In addition, plaintiff only accompanied her to one medical appointment, while defendant secured all vaccinations and attended all additional doctor visits. Plaintiff points out that defendant relied on WIC appointments even when well child visits would have been covered by insurance. Although it was subsequently determined that SGK was speech delayed, her physician had no concerns related to her development.

During the approximate nine-month period between the temporary custody order and the entry of the trial court's ultimate custody decision, plaintiff was responsible for providing for SGK's day-to-day needs most of the time, albeit with extensive assistance from his parents. Plaintiff argues that this fact precluded the court's decision that an established custodial environment existed with defendant only, and should have resulted in a determination that an established custodial environment existed with both parents. A custodial environment can be established as a result of a temporary order. See *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995). However, "[t]he existence of a temporary custody order does not preclude a finding that an established custodial environment exists with the noncustodian or that an established custodial environment does not exist with the custodian." *Berger*, 277 Mich App at 706-707.

For the first 18 months of her life, SGK resided with defendant exclusively. In fact, defendant took a 15-month leave of absence from work during that time. Defendant was essentially solely responsible for providing the child's meals and attending to her health needs. As a result, the child would naturally look to defendant for guidance, discipline, the necessities of life, and parental comfort. Although plaintiff became more involved in caring for SGK during the next nine months of her life, he relied heavily on his own parents in caring for her. Moreover, defendant continued to care for SGK on two overnights and one evening a week pursuant to the court's temporary order. Accordingly, the court's finding that an established custodial environment existed with defendant only is not against the great weight of the evidence.

Because an established custodial environment existed with defendant, plaintiff was required to prove by clear and convincing evidence that a change of the established custodial environment was in the best interests of the child. MCL 722.27(1)(c). Plaintiff argues that the trial court clearly erred in making determinations related to several of the statutory best interest factors. A trial court must consider each of the statutory factors when deciding the best interests of a child. *Sinicropi v Mazurek*, 273 Mich App 149, 182; 729 NW2d 256 (2006). The trial court need not give all of the factors equal weight, and may instead consider the relative weight of the factors given the circumstances of a particular case. *Id.* at 184.

Plaintiff specifically argues that the trial court incorrectly determined best interest factors (c), (d), (e), (h), and (l). The best interest factors are set forth in MCL 722.23, which provides, in part:

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

\* \* \*

(h) The home, school, and community record of the child.

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(l) Any other factor considered by the court to be relevant to a particular child custody dispute.

Regarding factor (c) (capacity to provide food, clothing, and other care), we cannot conclude that the evidence of record clearly preponderates against the court's finding of equality on this factor. The record establishes that at the time of the custody trial, both parties had the capacity and disposition to provide food, clothing, and medical or other remedial care. Plaintiff's medical insurance did not detract from defendant's attention to the child's medical needs. Moreover, there was no medical concern with the child's development while under defendant's care. In addition, the issues regarding defendant's ability to provide childcare while she was working had been resolved.

With respect to factor (d) (stable, satisfactory environment), the trial court again found the parties to be equally favored, despite noting that defendant's home is not "typical." We find no merit to plaintiff's argument that his position is supported by the court spending considerable time addressing potential concerns related to defendant's home in its analysis of this factor. That the court provided complete and thoughtful analysis related to plaintiff's numerous claims of inadequacies should not be held against defendant when each of those concerns were rejected by the court. Reviewing all of the evidence relevant to this factor, the evidence does not clearly and convincingly preponderate in plaintiff's favor on factor (d).

As for factor (e) (permanence of custodial home or homes), the trial court found that this factor favored defendant. In coming to this conclusion, the court noted that in defendant's home SGK has siblings closer in age residing with her. The evidence established that plaintiff has little to no contact with his other children from previous relationships. In fact, plaintiff voluntarily ended his relationship with his adopted daughter. The evidence thus supported the court's finding.

With respect to factor (h) (child's home, school, and community records), the trial court concluded this factor equally favored the parties. Plaintiff argues that the record demonstrates that he is more involved in SGK's activities and thus should have been favored under this factor. While defendant has not attended playgroups that SGK has participated in as part of the Early On

program, this lack of involvement appears to be the result of the timing of the playgroups, rather than the failure to appreciate or support them as a benefit to SGK. We also decline to find that defendant should have been disfavored under this factor because she does not attend church, when the record demonstrates that she does not prevent her children from participating in religious activities, and plaintiff did not start attending church until the institution of these proceedings. The trial court's conclusions were supported by the record.

In regard to factor (l) (other relevant factors), the trial court noted that Ellis and his relationship to defendant was a significant factor relevant to the resolution of this custody matter. However, after reviewing the evidence presented and taking the demeanor of the witnesses and the surrounding circumstances into account, the court concluded that defendant was truthful about her lack of relationship with Ellis. The court concluded that the October 2008 incident, when Ellis briefly stepped onto defendant's property and had contact with her older children, was not a sufficient basis to prevent defendant from having a custodial relationship with SGK. Defendant testified that she believed Ellis could be dangerous and obtained a PPO against him, and Ellis himself testified that defendant did not initiate contact with him and would not jeopardize her children for a relationship with him. It is a well-recognized principle of law that the trial court is in the best position to make credibility determinations. *Stallworth v Stallworth*, 275 Mich App 282, 286; 738 NW2d 264 (2007). The court's specific finding on this factor is supported by the evidence, giving due consideration to the incident involving Ellis and defendant's response to same.

In sum, the evidence does not clearly preponderate in favor of plaintiff on the challenged factors. Because the ultimate disposition was not against the great weight of the evidence, the trial court did not abuse its discretion in awarding primary physical custody of the child to defendant.

Affirmed.

/s/ Deborah A. Servitto  
/s/ E. Thomas Fitzgerald  
/s/ Jane M. Beckering